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ON THE FUNDAMENTAL HUMAN RIGHTS PROBLEMS OF A “WORKING MAN” IN POLAND: FEW REFLECTIONS*

Abstract

The following research goal is to compare the state of research and scientific findings concerning the human rights of a “working man” in Poland and in France, with the use of a library search. After reviewing the French manuals on employment law it is known that the subject of the “working man’s” human rights is a subject which is common in the academic field there, subject to much attention (Dockes 2018). Even a cursory lecture of the legal bibliography entries confirms the weighty importance of the issue of human rights in labour law (Didry 2018, pp. 241–264). Meanwhile in Poland the state of research is saddening. Not only there are no studies, but there is even no academic discussion in the field, moreover, it is even actively avoided. Of course one has to ask: why? What is the reason for this approach of the Polish legal science to the key subject of “working man’s” human rights in Poland? These are the questions that I try to answer herein.

Słowa kluczowe: podstawowe prawa pracowniczej, prawo pracy a prawa człowieka

Keywords: fundamental human rights of working man, labour law and human rights

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The paper below is a result of my reflections after my last study visit at the Collège de France, which took place at the end of June of 2019, in the Welfare state and globalization: legal analysis of solidarity (*État social et mondialisation: analyse juridique de solidarité*) department headed by a distinguished French scholar, professor Alain Supiot. I have assumed the following research goal: to compare the state of research and scientific findings concerning the human rights of a “working man” in Poland and in France, with the use of a library search. The results are appalling. After reviewing the French manuals on employment law it is known that the subject of the “working man’s” human rights is a subject which is common in the academic field there, subject to much attention (Dockes 2018). Even a cursory lecture of the legal bibliography entries confirms the

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weighty importance of the issue of human rights in labour law (Didry 2018, pp. 241–264). Meanwhile in Poland the state of research is saddening. Not only there are no studies, but there is even no academic discussion in the field, moreover, it is even actively avoided. Of course one has to ask: why? What is the reason for this approach of the Polish legal science to the key subject of “working man’s” human rights in Poland? These are the questions that I try to answer herein. But also, believing that the discussion in this field is going to start soon, I want to outline the first issues which should be considered the key ones in the Polish context in the subject in question.

I. The reasons for the lack of discussion in the Polish academic community, in the subject in question should be seen in my opinion in the general (common) reluctance to discuss this issue. Every time this issue was raised in the public space it was treated dismissively, marginalised and very quickly forgotten. A telling proof of this is the fate of the Social and Economic Charter Constitutional Act (www.sejm.gov.pl). On the day of 25 October of 1992 a group of Members of Parliament from the Democratic Left Alliance (SLD) have proposed a bill to pass the aforementioned project. As written in the explanatory memorandum: “The prolonged process of the drafting of the new Constitution of the Republic of Poland has caused the Parliament to pass a partial constitution act regulating the mutual relationships between the legislative and executive branches of the Republic of Poland and the regional authorities. The omission of the civil rights in this act has caused the President of the Republic of Poland to execute his initiative in the form of drafting the Fundamental Rights and Freedoms Charter. This draft concentrates on political and civil rights. Therefore, there is a strong need to ensure the necessary guarantees for social and economic rights and freedoms, which are equally important. The major transformation of the economical relationships underway in Poland undermine the value of previous social guarantees, which were formulated under completely different conditions. To prevent these rights from being neglected, a group of members of parliament has decided to propose passing the Social and Economic Charter as a constitutional act supplementing the so-called Small Constitution and the Rights and Freedoms Charter.” However, the project did not gain the required support. It was rejected. The Polish labour law doctrine did not react. One would look in vain for academic research taking up this issue.

As a side note, it is worth noting that this occurred because at the beginning of the transformation period the country has leaned strongly towards a very liberal doctrine, which treated work as an element of market and of exchange. The voice of the Liberal Democratic Congress (KLD) could be heard strongly in the political discussions at the time. In its policy statement of 1991 the Congress has opposed the “employee privileges which disrupt the labour markets and place the employers on an uneven legal footing with the employees.” The liberals from this party only verbally stated that the society is responsible for the fate of these, who cannot find their place under competitive market conditions; according to them the social security and social assistance may not fall in the domain of the state. Even the Democratic Union, even though advocating for “unhampered fostering of entrepreneurship, enforcing market mechanisms and

privatisation of the economy," but considering as necessary that "the state should ensure legal safeguards against the overuse of economic freedom with detriment to important social interest"—a part of them in the form of the Democratic Right Forum has sympathised with the liberal market economy model proposed by the Liberal Democratic Congress. It should be noted that after the transformation of the Democratic Union into the Freedom Union the party has not clearly and consistently opted for a social version of the market economy, which is so important for an orderly vision of labour (Zieliński 1997, pp. 16–17).

In this political atmosphere the initial actual transformations of the labour law occurred. Thus the first significant amendment of the Labour Code could not occur in the "logic" of market economy (see the so-called large amendment of the Labour Code of 1996, Dz.U. 1996, No. 24, item 110). People were, as a rule, "invisible." They were only the background of political and economical transformation. This is my opinion in the context of the deletion of the following statement from the labour code: "in People's Republic of Poland the highest goal of all activity is human, primarily the constant increase of material prosperity and cultural development." The space of social and economic changes in the scope of labour law was also far from satisfactory; I am thinking here about subsequent privatisations which completely ignored the "human factor" (Dunn 2008). I am convinced that their drastic course frequently occurred in an atmosphere of absolutism provided by the legal system which "valiantly" avoided any mentions of social economy.

To summarise the above, it may be said that the rejection of this draft of the Social and Economic Charter Constitutional Act can be accepted as a symbol, a disgraceful symbol, of the "sinking" of the "working man" human rights issue in the Polish public (political) space. However, even more horrifying is the fact that the legal science in Poland, in particular labour law science did not speak in this issue. The leading representative of the labour law doctrine at the time, J. Jończyk, has directly written at the beginning of the Polish transformation period that the role of employees towards the employee should be constructed in opposition, not in a solidaristic manner (Jończyk 1992, p. 139). It's unsurprising that such an approach at the beginning has closed the path to discuss the "working man" human rights, for which the issue of solidarity was key.

The balance of hopelessness concerning the "working man" human rights culture in Poland, in my opinion, was tipped by the ruling of the Supreme Court of 8 February 2000 (II UKN 374/99; similarly: the Supreme Administrative Court (NSA) in the decision in the matter I OSK 8/08 of 16 May 2006), in which the Court has stated that the International Covenant on Economic, Social and Cultural Rights does not specify any uniform rules which would be applied by the countries in reference to the Covenant, and as a consequence has decided that the Covenant's implementation is a matter of national legislation. It's difficult to even comment on this. What is really sad is that the issue of social rights was basically absolutely sunk. The trend of treating of social rights as second-category rights is basically ubiquitous in Polish public life. It is appalling that the official position of the Polish government presented in the UN human

right treaty bodies states that the social rights in the treaties ratified by Poland, which—despite prevailing over Polish acts in case of conflict in accordance with the Constitution—do not have a normative character, because they differ in their nature from political and personal rights; these last are subject to direct application in the Polish legal system (see comments by the Government of Poland on the concluding observations: UN Doc. E/C.12/POL/CO/5, §§ 1–6; this document was referred to in the last report issued by Poland, E/C.12/POL/Q6, §§ 2–4 of 2016). Moreover, in their official positions the Polish government, referring to the aforementioned states that in Polish case law it refers to the International Covenant on Economic, Social and Cultural Rights as a “set of guidelines used in the interpretation of the national legal system” (replies of Poland to the List of issues [in relation to the sixth periodic report of Poland], UN Doc. E/C.12/POL/Q/6/Add.1, § 3). As rightly pointed out by Z. Kędzia this unfortunate—contradictory to the interpretation of the Covenant carried out by the Economic, Social and Cultural Rights Committee appointed for this purpose, and in fact depreciating the legal status of the discussed standards—this interpretation is institutionally confirmed by the political position of Polish authorities, in an cross-party consensus. This is expressed in the non-ratification of the Revised European Social Charter, non-ratification of complaints procedure referring to the social rights established both within the European Council and the United Nations, and in the co-authoring of the British and Polish Protocol, which fundamentally refers to the title IV of the EU Fundamental Rights Charter dedicated to social rights.¹

Therefore, it’s not surprising that in the concluding observations drawn up after the consideration in the November of 2009 the Fifth Periodic Report of Poland, the Committee on ESCR has expressed their concern that Poland is treating ICESCR as an act which only indicates goals and declaration, and therefore—also a concern with the lack of training for judges and social workers on the rights expressed in the charter. The Committee has repeated in this document the position that the implementation of all rights expressed in the ICESCR is enforceable.²

Briefly and mildly speaking, in Poland the issue of “working man” human rights does not raise the animated interest it does in foreign academic centres. References to the jurisprudence of other countries, which in foreign literature are considered a significant achievement in the field of judicial enforcement of social rights are rare. Moreover the

¹ Already 13 years ago the Ministry of Labour and Social Policy has published on its website an information on the signing (but not ratifying) by Poland of the Revised Social Charter in 2005 and simultaneously stated that “As a result of an analysis of the Polish legislation and the provisions of the Charter and the possible economic and social consequences of their removal, it is anticipated that in 2006 systemic efforts will be made towards the ratification of the document”. However, this announcement did not bring about a final result (Kędzia 2018, p. 70).

² CESCR, Consideration of reports submitted by States parties under Art. 16 and 17 of the Covenant Concluding observations of the Committee on Economic, Social and Cultural State, Poland. Poland under Art. 16 and 17 of the ICESCR is required to file periodical reports on the measures undertaken and the progress made on the compliance with the rights specified in the Charter.

provisions of the Polish Constitution of 2 April 1997, which regulate social rights are not frequently analysed in the aspect of their enforcement through court proceedings. Therefore Polish legal science does not raise the issue of the "working man" human rights. The aforementioned is also one of the reasons for which the issue of the "working man" human rights does not appear in the space of jurisprudence, which does not achieve independence and courage in that matter.

II. Meanwhile the scientific problems in this field are still numerous. The key issue is whether the constitutional social rights (as well as social rights regulated in the international treaties) despite the features they are assigned (general nature of the regulation, services as the subject of law) may be sought through courts (*justiciability of social rights*). In order to provide a response thereto, it is necessary to refer to the issue of the legal character of the group of social rights in the Polish Constitution. There practically are no comprehensive studies in that field.

There are three groups of social rights distinguished in the case law of the Constitutional Tribunal:

1. including regulations where the lawmaker only indicated some assumptions, directions or strategies of action, but which does not result in the duty to perform obligations through the issuing of legal acts;
2. including the obligation on the ordinary legislator to issue statutory regulations, but not specifying in detail how to implement these regulations; these regulations only specify that the "method of implementation of the law," "employer's duties," "scope and form of protection" are specified by the act;
3. including regulations, which do not only specify the obligation of issuing an act, but also specifies—at least to some degree—the subject or direction of the regulations in the ordinary act (judgment of the Constitutional Tribunal of 2 July 2002, U 7/01).

Indeed, the social rights in the Polish Constitution were not uniformly specified, and moreover, the manner of specification of these rights is partially different from the specification of personal and political rights.

1. Once they are human rights, once: citizen's, worker's, everyone's rights.
2. Other regulations specify not "rights," but the duties of public authorities or of the state; in other words, some of the regulations where the term "law" does not appear refers clearly to state policy goals, like for example Art. 75(1).

That is why it is necessary first to establish the legal character of constitutional social rights and the legal consequences for an individual resulting thereof, especially under the justiciability of social rights. It has to be known which social regulations express subjective rights, and which only contain a "message" on the principles of state policy, therefore being programme standards, which do not give rise to potential claims on part of an individual.

After establishing the legal character of these rights—the social rights in the Polish Constitution it seems necessary to indicate their contents, that is, the contents of constitutional social rights. Here one should be aware that it is necessary to differentiate between the "essence" of social law and its "peripheral elements." Therefore it should

be considered that the contents of the given social right is not established solely by the axiology of the Polish Constitution, but also determined by international standards on the “working man” human rights (in accordance with Art. 9 of the Constitution, the Republic of Poland respects binding international law). Taking then into account that the established social right in the Polish context is fundamentally contained in the statutory regulations, the compliance of the legal regulations (therefore specific statutory solutions) with international agreements and the EU law should be verified; not losing sight of the issue of self-execution of the international law standards, since when a given act is contrary to international law, and the international law standard is self-executing, then this standard will apply.

As a consequence of establishing the contents of the given social law and settling its legal character, and therefore establishing whether it creates a claim on part of an individual, the problem of the scope within which social rights might be subject to control arises, and to be more specific, the issue of the acceptability of the law-shaping role of the courts in the Polish legal system. In the Polish academic discourse the principle of separation of powers is quoted as an argument against judiciary protection of social rights (Bałaban 1997, p. 13). This last issue should also be settled.

I have specified above completely basic questions that would have to be answered. More complex issues that should have to be considered include the concept of horizontal application of constitutional rights.

The provision of Art. 31(2) first sentence is one of a few constitutional regulations which touch on the issues of horizontal application of constitutional freedoms and rights. It is obvious that the constitutional freedoms and rights provide protection in vertical relationships, that is, in relationships between private entities and public authorities. Thus a question naturally arises whether constitutional rights and freedoms also provide protection in horizontal relationships, that is, relationships between private entities. A separate question that thus arises in reference to the issue of direct application of constitutional social rights concerns the possibility of an individual (in a situation where there is no statutory regulation) requesting an injunction to desist the violation of his or her social rights by entities other than public authorities (by private entities). In short: whether constitutional freedoms and social rights have an impact on an individual's situation in relationships with entities other than public authorities, and thus protect an individual on a horizontal level, obliging also private legal entities, natural persons and others to desist from the infringement of social rights. In other words, the concern is about the possibility of direct horizontal impact (application) of social rights, which would mean that the constitutional standard would become an independent basis for a court judgment concerning a dispute in the field of protection of social rights (Garlicki, Zubik 2014, commentary to Art. 31 of the Polish Constitution).

The Polish legal doctrine did not provide an unequivocal answer to the question whether constitutional freedoms and rights may form the basis for judgments concerning relationships between private entities. Generally it is not disputed that constitutional freedoms and rights direct the interpretation of regulations which control the

relationships between private entities and may be co-applied with acts when issuing rulings concerning such relationships (so-called indirect horizontal effect). There is still a question remaining whether the listed regulations also have direct horizontal effects, that is, can they be a direct/independent basis for a ruling concerning relationships between private entities. This is a subject of a dispute (Wojtyczek 1999; Banaszak 2010, p. 477; Florczak-Wątor 2013, pp. 252, 348–370).

The regulation of art. 31(2) 1st sentence requires private entities to respect the freedoms and rights of others. This regulation provides a horizontal dimension to constitutional freedoms and rights. The guarantee of fulfilling the aforementioned duty by entities outside of the public authorities is the duty of these authorities to ensure legal protection of freedom (Art. 31(1)); this is naturally related with the imposing of a specific total amount of prohibitions and rules on the freedom of other entities. In other words: this regulation formulates a clear obligation for every entity—not being a public authority body—to respect the rights of other persons, and therefore—an obligation to restrain oneself from intervening in the sphere of these rights. This regulation expresses then the limits to rights and freedoms of every human being, who when exercising his rights and freedoms may not infringe on the rights and freedoms of other persons. As justly stated by K. Wojtyczek, Art. 32(2) 2nd sentence of the Polish Constitution expresses the lawmaker's pursuit to ensure the protection of human rights in the horizontal plane, however it does not prejudices the manner in which these rights are realized between private entities (Wojtyczek 1999).

Against the horizontal application of constitutional freedoms and rights the argument of imprecision of such a duty and the need to specify it in detailed statutory rules is frequently raised. Meanwhile there is no basis to reject the possibility of direct application of constitutional rights and freedoms in the relationships between private entities. It should be remembered that this horizontal application is fully in line with the framework established by various acts which regulate the relationships between private entities, and in particular the Civil Code and the Labour Code and relates to the use of sanctions anticipated therein. In particular, the liability for damages due to the violation of constitutional rights and freedoms, as well as the annulment of legal actions which violate the constitutional rights or freedoms should be allowed. Moreover the use of legal rights in the manner which violates the constitutional freedoms and rights of other persons should be considered a misuse of law (Garlicki, Zubik 2014, commentary to Art. 31 of the Polish Constitution).

The above is only one of the dilemmas from the field of "working man" human rights which are presented to the doctrine and the judiciary, should the Polish science and jurisdiction intend to approach seriously and responsibly the problem referred to in the title. However no such intentions are in any way visible.

Still, it is inspiring that a reference to human rights can be found in the draft of the Polish Labour Code of 2017 (available on the websites of the Ministry of Family, Labour and Social Policy), even though it is not such a comprehensive regulation as the draft of the French Labour Code. In the French Labour code there's a chapter

entitled Fundamental Rights (Droits Fondamentaux), starting with a preamble, which points out very clearly and subtly at the same time the heritage of our civilisation in the field of protection of the working man (see: Proposition de Code du Travail, Sous l'égide du Groupe de recherché pour un autre Code du Travail (GR-PACT), Dalloz, 2017, p. XII). It states as follows: the fundamental rights of working men are evidently (*notamment*) those contained in the Declaration of Human and Citizen Rights of 1789, but also in the Preamble of the Constitution of 27 October 1946, Charter of the Fundamental Social Rights of Workers of 1989, Charter of Fundamental Rights of the European Union, European Social Charter, Convention for the Protection of Human Rights and Fundamental Freedoms, the conventions of the International Labour Organisation ratified by France and other international covenants concerning economical, social and cultural, political and citizens rights. Subsequently it moves onto the listing of the fundamental rights, where it stated as follows, that in relation to the aforementioned preamble: in the spirit of the aforementioned texts, every employee is, and it is repeated again: evidently (*notamment*), somehow “entitled” (*titulaire*) to subsequent rights.

To summarize, it should be stated that there's an enormous amount of work for the Polish science and judicature to process the entire corpus of “working man” human rights material. This is not facilitated by the social rights regulation in the Polish Constitution. Only after performing this task it will be possible to critically refer to the normative layer of ordinary legislation, in particular the Labour Code. Already it might be stated today that many of the theses which were derived based on the Labour Code will be put in doubt. Certainly a thorough verification of the hitherto existing interpretation will be required for the labour law principles, which are nothing else than the “working man” human rights. In turn it is easy to guess that many other more detailed, hitherto existing scientific conclusions will have to be subject to analytical assessment. This work, of the detailed analysis of “working man” human rights, in turn, was already performed by French scientists. Their scientific achievements may be used as help. We only have to reach for them.

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